

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

DEC 19 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
) CC Docket No. 96-45
Federal-State Joint Board on)
Universal Service)

COMMENTS OF DIRECTV, INC. AND
HUGHES COMMUNICATIONS GALAXY, INC.

DIRECTV, Inc. ("DIRECTV") and Hughes Communications Galaxy, Inc. ("HCG") submit these Comments in response to the Public Notice seeking comment on the *Recommended Decision* of the Federal-State Joint Board on Universal Service ("Joint Board") proposing changes to the Commission's existing policies to implement the universal service provisions of the Telecommunications Act of 1996 ("1996 Act").¹ DIRECTV and HCG support Congress' efforts in the 1996 Act to ensure that affordable telecommunications services are available to all Americans and that all telecommunications carriers equitably bear the cost of providing that service.² DIRECTV and HCG also generally support the Joint Board's recommendation to broaden the base of contributors to the Universal Service Fund ("USF") to include a range of carriers, including certain satellite operators.³ For the reasons set forth below,

¹ In the Matter of Federal-State Joint Board on Universal Service, *Recommended Decision*, CC Docket No. 96-45, FCC 96J-3 (Nov. 8, 1996) (*Recommended Decision*).

² 47 U.S.C. § 254(b). See 47 U.S.C. § 153 (defining telecommunications carrier).

³ *Recommended Decision*, FCC 96J-3, at ¶¶ 779-801.

No. of Copies rec'd
List ABCOE

029

DIRECTV and HCG submit these limited comments only to clarify that, in including satellite operators within the base of contributors to the USF, the Joint Board did not mean, and could not have meant, to include multichannel video programming distributors (“MVPDs”), such as DIRECTV, and satellite operators, such as HCG, that sell or lease transponder capacity on a non-common carrier basis.

DIRECTV and HCG are satellite licensees. DIRECTV began operating the first high-power DBS service in the U.S. in 1994 and presently provides approximately 175 video and audio channels to more than two million subscribers over three satellites. DIRECTV provides its subscribers a variety of music and video programming, including access to premium movie channels and pay-per-view programming. HCG operates a fleet of in-orbit communications satellites that provide a means for commercial television and radio distribution, teleconferencing, video backhaul, high speed image transmission, educational programming, and private data networks, among other services. Under the Commission’s *Domestic Fixed-Satellite Transponder Sales Decision*,⁴ HCG sells and leases transponder capacity to a variety of communications entities, ranging from HBO and NBC to educational institutions, enabling the delivery of programming to cable headends and communications services to private users around the country.

Although the Joint Board stated that “[w]e find no reason to exempt from contribution . . . satellite operators,”⁵ the Joint Board plainly did not intend to require satellite

⁴ 90 F.C.C. 2d 1238 (1982), *aff’d sub nom. Wold v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984).

⁵ *Recommended Decision*, FCC 96J-3, at ¶ 785.

licensees such as DIRECTV and HCG to contribute to the USF because they are not “telecommunications carriers” under the 1996 Act. Congress defined the term telecommunications carrier as “any provider of telecommunications services,”⁶ and the term “telecommunications services” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”⁷ In addition, Congress defined “telecommunications” as the “transmission between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁸ In the Conference Report, Congress further clarified that “the term ‘telecommunications service’ is defined as those services and facilities offered on a ‘common carrier’ basis, recognizing the distinction between common carrier offerings that are provided to the public ... and private services.”⁹

In applying these statutory definitions, it is clear that all satellite operators are not “telecommunications carriers” subject to the requirement that they contribute to the USF. In particular, MVPDs, like DIRECTV, plainly do not satisfy Congress’ initial threshold, since they do not provide “telecommunications.” DIRECTV’s subscribers do not specify the points between which the service is transmitted, or the video and audio services that DIRECTV carries. Rather, as an MVPD, DIRECTV provides point-to-multipoint service to subscribers located

⁶ 47 U.S.C. § 153(44).

⁷ 47 U.S.C. § 153(46).

⁸ 47 U.S.C. § 153(43).

⁹ Jt. Statement of Managers, S. Conf. Rept. No. 104-230, 104th Cong., 2nd Sess. 115 (1996) (“Conference Report”).

anywhere within its coverage area. While an individual customer may select the video and audio programming that he or she desires to view or hear, DIRECTV is solely responsible for selecting the programming options available to subscribers.

It is equally clear that, except with respect to the limited common carrier services they may provide, satellite operators such as HCG do not meet Congress' definition of "telecommunications carrier" because they do not provide "telecommunications services."¹⁰ HCG's offering of satellite capacity to third parties typically involves sales of transponder capacity and long-term lease arrangements that are highly individualized to meet the specific needs of its customers. Such services are not uniformly and nondiscriminatorily available to the public on a common carrier basis.¹¹ As the Joint Board noted, Congress specifically found that such entities differ from providers of telecommunications services that would be required to contribute to the USF because "the term 'telecommunications service' is defined as those services and facilities offered on a 'common carrier' basis, recognizing the distinction between common carrier offerings that are provided to the public ..., and private services."¹²

¹⁰ Hughes Communications Carrier Services, Inc., an affiliate of HCG and DIRECTV, utilizes a small number of common carrier circuits to provide international business services.

¹¹ Domestic Fixed-Satellite Transponder Sales, *Memorandum Opinion, Order and Authorization*, 90 F.C.C.2d 1238 (1982), *aff'd sub nom. Wold Comm., Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984). See also *Nat'l. Assoc. of Reg. Util. Comm'rs. v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) (distinguishing between common and private carriers on the basis of whether the carrier holds itself out to the public). Under the 1996 Act, a telecommunications carrier that purchases or leases transponder capacity of course may be obligated to contribute on its own behalf to the USF.

¹² *Recommended Decision*, FCC 96J-3, at ¶ 779 (quoting the Conference Report at 115). As the Supreme Court has recognized, language included in a Conference Report is the

(continued...)

This conclusion is fully consistent with the Joint Board's recommendation that the Commission adopt the approach used to identify contributors to the telecommunications relay services ("TRS") pool.¹³ The TRS funding mechanism, like the proposed universal service support mechanism, requires communications providers to contribute toward the provision of TRS only to the extent that they provide interstate telecommunications services.¹⁴ As the Joint Board has recognized, carriers and the Commission already are familiar with this approach.¹⁵ In view of the experience that the Commission has gained implementing TRS, applying this definition in the universal service context also would be administratively simpler to implement than devising alternative mechanisms.¹⁶ Thus, consistent with the TRS approach, the Commission should require satellite operators to contribute to the USF only to the extent that they provide telecommunications services.¹⁷

(...continued)

most persuasive evidence of congressional intent next to the statute itself and is due great weight. *See National Ass'n of Greeting Card Publishers v. U.S. Postal Serv.*, 462 U.S. 810, ___ n. 28, 103 S.Ct. 2717, 2731 n. 28, 77 L.Ed2d 195, 212 n. 28 (1983).

¹³ *Recommended Decision*, FCC 96J-3, at ¶ 786. In the TRS proceeding, the Commission required contributions from interstate telecommunications service providers, including certain satellite licensees. *See Telecommunications Relay Services and the Americans With Disabilities Act of 1990, Third Report and Order*, 8 FCC Rcd 5300, 5302 (1993) ("TRS Order"); *see also* 47 C.F.R. § 64.604(c)(4)(iii)(A) (identifying telecommunications providers that must contribute to the fund). As noted *supra* at note 10, an affiliate of HCG and DIRECTV provides limited common carrier services and therefore contributes to the TRS pool.

¹⁴ *Recommended Decision*, FCC96J-3, at ¶ 786.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *TRS Order*, 8 FCC Rcd 5300.

It would be illogical to require satellite operators to contribute to the USF with respect to their non-telecommunications services. There simply is no nexus between MVPD services or the sale or long-term lease of transponder capacity to video programmers, on the one hand, and universal access to basic local telephone service, on the other hand. Moreover, it would be fundamentally unfair to require licensees offering such services to contribute to the USF because, unlike other telecommunications providers, they have no ability to recover what appear to be potentially massive costs.¹⁸ For example, except for the transponder capacity made available to occasional users, such as educational institutions, virtually all of the capacity on HCG's existing satellites has been sold or is subject to long-term leases in which the price terms are no longer negotiable. Additionally, transponder capacity on other satellites that HCG is planning to launch in 1997 and 1998 already has been substantially leased or sold. Under these circumstances, there is no basis for requiring MVPDs and transponder sellers and lessors to contribute to the USF.

¹⁸ Because the Joint Board has not recommended a specific formula to calculate USF contributions, DIRECTV and HCG are unable to measure the potential costs they would incur if they were required to contribute to the USF. Such an amount, however, certainly would be substantial, in view of the approximately \$17 billion needed to fund the USF.

For the foregoing reasons, the Commission should not require satellite licensees that do not also qualify as "telecommunications carriers" to contribute to the USF.

Respectfully submitted,

DIRECTV, INC. and
HUGHES COMMUNICATIONS GALAXY, INC.

By: 

Gary M. Epstein

~~Teresa D. Baer~~

~~Susan E. McNeil*~~

LATHAM & WATKINS

1001 Pennsylvania Avenue, N.W.

Suite 1300

Washington, D.C. 20004

(202) 637-2200

December 19, 1996

*Admitted in Maryland only.

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of December, 1996, caused copies of the foregoing "Comments of DIRECTV, INC. and Hughes Communications Galaxy, Inc." to be served by first class mail, postage prepaid, on the following:

The Honorable Reed E. Hundt, Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

The Honorable Rachelle B. Chong,
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

The Honorable Susan Ness,
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

The Honorable Julia Johnson,
Commissioner
Florida Public Service Commission
2540 Shumard Oak Blvd.
Gerald Gunter Building
Tallahassee, FL 32399-0850

The Honorable Kenneth McClure,
Commissioner
Missouri Public Service Commission
301 W. High Street; Suite 530
Jefferson City, MO 65101

The Honorable Sharon L. Nelson,
Chairman
Washington Utilities and Transportation
Commission
P.O. Box 47250
Olympia, WA 98504-7250

Martha S. Hogerty
Public Counsel for the State of Missouri
P.O. Box 7800
Jefferson City, MO 65102

Paul E. Pederson, State Staff Chair
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Lisa Boehley
Federal Communications Commission
2100 M Street, N.W.; Room 8605
Washington, D.C. 20554

Charles Bolle
South Dakota Public Utilities Commission
State Capitol, 500 E. Capitol Street
Pierre, SD 57501-5070

Deonne Bruning
Nebraska Public Service Commission
300 The Atrium
1200 N Street, P.O. Box 94927
Lincoln, NE 68509-4927

James Casserly
Federal Communications Commission
Office of Commissioner Ness
1919 M Street, Room 832
Washington, D.C. 20554

John Clark
Federal Communications Commission
2100 M Street, N.W.; Room 8619
Washington, D.C. 20554

The Honorable Laska Schoenfelder,
Commissioner
South Dakota Public Utilities Commission
State Capitol, 500 E. Capitol Street
Pierre, SD 57510-5070

Irene Flannery
Federal Communications Commission
2100 M Street, N.W.; Room 8922
Washington, D.C. 20554

Daniel Gonzalez
Federal Communications Commission
Office of Commissioner Chong
1919 M Street, N.W.; Room 844
Washington, D.C. 20554

Emily Hoffnar
Federal Communications Commission
2100 M Street, Room 8623
Washington, D.C. 20554

L. Charles Keller
Federal Communications Commission
2100 M Street, N.W.; Room 8918
Washington, D.C. 20554

Lori Kenyon
Alaska Public Utilities Commission
1016 West Sixth Avenue; Suite 400
Anchorage, AK 99501

David Krech
Federal Communications Commission
2025 M Street, N.W.; Room 7130
Washington, D.C. 20554

Debra M. Kriete
Pennsylvania Public Utilities Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Diane Law
Federal Communications Commission
2100 M Street, N.W.; Room 8920
Washington, D.C. 20554

Bryan Clopton
Federal Communications Commission
2100 M Street, N.W.; Room 8615
Washington, D.C. 20554

Robert Loube
Federal Communications Commission
2100 M Street, N.W.; Room 8914
Washington, D.C. 20554

Samuel Loudenslager
Arkansas Public Service Commission
P.O. Box 400
Little Rock, AR 72203-0400

Sandra Makeeff
Iowa Utilities Board
Lucas State Office Building
Des Moines, IA 50319

Philip F. McClelland
Pennsylvania Office of Consumer
Advocate
1425 Strawberry Square
Harrisburg, Pennsylvania 17120

Michael A. McRae
D.C. Office of the People's Counsel
1133 15th Street, N.W.; Suite 500
Washington, D.C. 20005

Tejal Mehta
Federal Communications Commission
2100 M Street, N.W.; Room 8625
Washington, D.C. 20554

Terry Monroe
New York Public Service Commission
3 Empire Plaza
Albany, New York 12223

John Morabito
Deputy Division Chief, Accounting
and Audits
Federal Communications Commission
2000 L Street, N.W.; Suite 812
Washington, D.C. 20554

Mark Long
Florida Public Service Commission
2540 Shumard Oak Blvd.
Gerald Gunter Building
Tallahassee, FL 32399

John Nakahata
Federal Communications Commission
Office of the Chairman
1919 M Street, N.W.; Room 814
Washington, D.C. 20554

Lee Palagyi
Washington Utilities and transportation
Commission
1300 South Evergreen Park Drive S.W.
Olympia, WA 98504

Kimberly Parker
Federal Communications Commission
2100 M Street, N.W.; Room 8609
Washington, D.C. 20554

Barry Payne
Indiana Office of the Consumer Counsel
100 North Senate Avenue; Room N501
Indianapolis, IN 46204-2208

Jeanine Poltronieri
Federal Communications Commission
2100 M Street, N.W.; Room 8924
Washington, D.C. 20554

James Bradford Ramsay
National Association of Regulatory Utility
Commissioners
P.O. Box 684
Washington, D.C. 20044-0684

Brian Roberts
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Gary Seigel
Federal Communications Commission
2000 L Street, N.W.; Room 812
Washington, D.C. 20554

Mark Nadel
Federal Communications Commission
2100 M Street, N.W.; Room 8916
Washington, D.C. 20554

Pamela Szymczak
Federal Communications Commission
2100 M Street, N.W.; Room 8912
Washington, D.C. 20554

Lori Wright
Federal Communications Commission
2100 M Street, N.W.; Room 8603
Washington, D.C. 20554

Regina Keeney, Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.; Room 500
Washington, D.C. 20554

Kenneth P. Moran
Common Carrier Bureau
Federal Communications Commission
2000 L Street, N.W.; Room 812
Washington, D.C. 20554

Donald H. Gips, Chief
International Bureau
Federal Communications Commission
2000 M Street, N.W.; Room 830
Washington, D.C. 20554

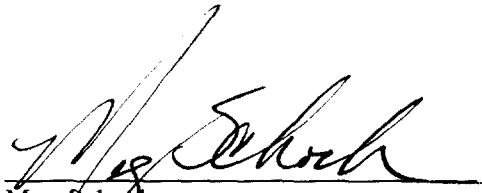
Thomas S. Tycz, Chief
Satellite and Radiocommunication Division
International Bureau
Federal Communications Commission
2000 M Street, N.W.; room 811
Washington, D.C. 20554

Fern J. Jarmulnek, Chief
Satellite Policy Branch
Satellite and Radiocommunication Division
International Bureau
Federal Communications Commission
2000 M Street, N.W.; Room 518
Washington, D.C. 20554

Richard Smith
Federal Communications Commission
2100 M Street, N.W.; Room, 8605
Washington, D.C. 20554

Kathleen Campbell
International Bureau
Federal Communications Commission
2000 M Street, N.W.; Room 505
Washington, D.C. 20554

Karl A. Kensinger
International Bureau
Federal Communications Commission
2000 M Street, N.W.; Room 521
Washington, D.C. 20554



Meg Schock